MELANTRANS SDN BHD

v.

CARAH ENTERPRISE SDN BHD & ANOR

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-16-2000(W)]
13 MARCH 2003

LAND LAW: *Charge - Receivers and managers - Power of sale to sell asset under debenture - Whether receiver and manager could sell asset by private treaty - Whether sale should comply with provisions for judicial sale under National Land Code - Whether provisions thereof apply only in respect of sale undertaken by chargee and not chargor - Whether receiver and manager acting on behalf of chargor empowered to sell under valid power of attorney - Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors - National Land Code, s. 256(2) - Powers of Attorney Act 1946, ss. 3(2), 4(1)*

COMPANY LAW: *Receivership - Receivers and managers - Power of sale to sell asset under debenture - Whether receiver and manager could sell asset by private treaty - Whether sale should comply with provisions for judicial sale under National Land Code - Whether provisions thereof apply only in respect of sale undertaken by chargee and not chargor - Whether receiver and manager acting on behalf of chargor empowered to sell under valid power of attorney - Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors - National Land Code, s. 256(2) - Powers of Attorney Act 1946, ss. 3(2), 4(1)*

The first respondent, the registered proprietor of a certain lease in land ('the lease'), executed a debenture and a legal charge in favour of the second respondent bank. Pursuant to the provisions of the debenture, the second respondent appointed a receiver and manager ('R & M') in respect of all the assets and undertakings of the first respondent. R & M was also empowered to act as agent of the first respondent and to effect the sale of the asset secured by the debenture. Further, R & M was irrevocably appointed the lawful attorney of the first respondent. R & M then entered into a sale and purchase agreement ('S & P') with the appellant to sell the lease. Subsequently, the appellant refused to proceed with the agreement on the ground that R & M did not have

the power to sell the lease by private agreement. This was because the Supreme Court in the case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors ('Kimlin')* had decided that receivers and managers were not entitled to sell charged lands without taking proceedings under the National Land Code ('NLC') for a judicial sale. Nevertheless, the first respondent applied for and obtained a declaration in the High Court that R & M was duly empowered to sell the lease and that the S & P agreement was valid and binding. The appellant appealed to the Court of Appeal. The Court of Appeal distinguished the case of *Kimlin* and dismissed the appeal. Hence, the appellant's instant appeal to the Federal Court.

The issue before the court was whether the facts in this case were distinguishable from the facts in *Kimlin* entitling R & M to sell the lease by private treaty. This was because the first respondent was not wound up, and there was an express provision under the debenture appointing R & M as the lawful attorney of the first respondent.

Held:
Per Mohamed Dzaiddin FCJ

[1] In *Kimlin*, it was abundantly clear that the debenture created by the borrower company in favour of the bank did not contain an express provision appointing the receivers and managers as the attorney of the borrower company. Secondly, the borrower company went into liquidation and it was the liquidator who opposed the application for sale under the debenture. Further, s. 256(2) NLC provides a prescribed method of sale to be undertaken by a chargee and not a chargor. In this case, R & M undertook the sale on behalf of the chargor of the lease, *ie*, the first respondent. The provisions of the NLC prescribing judicial sale did not apply because R & M was acting as agent for the chargor and not the chargee. The power of attorney was also valid as it complied with ss. 3(2) and 4(1) of the Powers of Attorney Act 1949. Therefore, R & M could act and exercise the power under the debenture. The case of *Kimlin* was distinguished. (pp 94 e-h & 95 a-d)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden pertama, tuanpunya berdaftar sesuatu pajakan ('pajakan itu'), telah menyempurnakan satu debentur dan gadaian sah atas nama responden kedua. Selaras dengan peruntukan-peruntukan debentur tersebut, responden kedua telah melantik penerima dan pengurus ('P & P') berhubung dengan segala aset-aset

responden pertama. P & P juga berkuasa untuk bertindak sebagai agen responden pertama dan melaksanakan jualan aset di bawah debentur tersebut. Tambahan pula, P & P telah dilantik sebagai wakil sah responden pertama secara tidak boleh batal. Selepas itu, P & P telah memasuki satu perjanjian jualbeli dengan perayu untuk menjual pajakan itu. Kemudiannya, perayu tidak ingin untuk meneruskan dengan perjanjian tersebut atas alasan bahawa P & P tidak berkuasa untuk menjual pajakan itu. Ini adalah kerana Mahkamah Agung dalam kes *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors ('Kimlin')* telah memutuskan bahawa penerima dan pengurus dalam kes tersebut tidak berhak untuk menjual tanah-tanah yang digadaikan tanpa mengambil prosiding di bawah Kanun Tanah Negara ('KTN') untuk penjualan kehakiman. Namun demikian, responden pertama telah memohon untuk mendapatkan dan telahpun memperolehi satu pengisytiharan di Mahkamah Tinggi bahawa P & P berhak menjual pajakan itu dan perjanjian jualbeli tersebut adalah sah dan mengikat. Perayu telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan membezakan kes *Kimlin* dan menolak rayuan perayu. Maka rayuan perayu ke Mahkamah Persekutuan.

Isu di hadapan mahkamah ialah sama ada fakta-fakta kes ini berbeza daripada fakta-fakta kes *Kimlin* memberikan P & P hak untuk menjual pajakan itu secara perjanjian persendirian. Ini adalah kerana responden pertama tidak tergulung, dan juga terdapat satu peruntukkan yang nyata di bawah debentur melantikkan P & P sebagai wakil sah responden pertama.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Kes *Kimlin* jelas menunjukkan bahawa debentur yang diwujudkan oleh syarikat peminjam bagi pihak bank tidak mempunyai peruntukkan yang nyata melantikkan penerima dan pengurus sebagai wakil syarikat peminjam. Keduanya, syarikat peminjam berada dalam likuidasi dan likuidator yang menentang permohonan jualan di bawah debentur tersebut. Tambahan pula, s. 256(2) KTN menetapkan cara jualan yang patut diikuti oleh pemegang gadaian dan bukan penggadai. Dalam kes ini, P & P menjual pajakan itu bagi pihak pengadai iaitu responden pertama. Dengan itu, peruntukkan-peruntukkan KTN yang menetapkan jualan kehakiman tidak terpakai kepada fakta-fakta kes ini kerana P & P bertindak sebagai agen penggadai dan bukan sebagai agen pemegang gadaian. Surat kuasa wakil tersebut juga adalah sah mengikut ss. 3(2) dan 4(1) Akta Surat Kuasa Wakil 1949. Seterusnya, kes *Kimlin* dibezakan.

Rayuan ditolak.]

Case(s) referred to:

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd [1997] 3 CLJ 274 SC ***(dist)***

Legislation referred to:

Companies Act 1965, s. 108
Contracts Act 1950, s. 24
Courts of Judicature Act 1964, s. 78(1)
National Land Code, ss. 206(3), 256(2)
Powers of Attorney Act 1949, ss. 3(2), 4(1)

Other source(s) referred to:

Dass, *The Torrens System in Malaya*, p 429, paras 2 & 3

For the appellant - Ng Chew Hor (Steven Chia Quek Seng); M/s Iqbal Hakim, Sia & Voo
For the 1st respondent - DP Naban (Nitin Nadkarni, Douglas Yee & Sunita Abraham); M/s Lee Hishammuddin
For the 2nd respondent - Lim Chee Wee; M/s Skrine

[Appeal from Court of Appeal, Civil Appeal No: W-02-620-1997]

Reported by Usha Thiagarajah

JUDGMENT

Mohamed Dzaiddin FCJ

This is an appeal from the decision of the Court of Appeal concerning the powers of the receivers and managers appointed under the debenture to sell the property charged under the National Land Code by private treaty.

On 24 July 2002, we granted leave to appeal on the following question of law:

> Notwithstanding a valid Power of Attorney contained in a Debenture, can the Receivers and Managers appointed under the said Debenture proceed to sell the property charged under the National Land Code by private treaty?

Brief Facts

The first respondent is the registered proprietor of the lease of a piece of land held under qualified title H.S.(D) 143155 PTD 80563, Mukim of Plentong, District of Johor Bahru, Johor (the said lease).

On 30 June 1992 the first respondent executed a debenture in favour of the second respondent as security for banking facilities granted by the latter. Later, the first respondent executed a first legal charge over the said lease under the National Land Code which was duly registered on 18 July 1992.

On 9 February 1994 the second respondent exercised their right under the said debenture and appointed one Lim Tian Huat of Messrs. Arthur Anderson & Co. as the receiver and manager (hereinafter shall be referred to as 'R & M') of all the assets and undertakings of the first respondent. Clause 12.2 of the debenture empowered the R & M to act as agent of the first respondent and cl. 12.2(c) further empowered him to effect the sale of the asset secured by the debenture after taking possession of them. By cl. 12.5(a), R & M is also irrevocably appointed the lawful attorney of the first respondent.

On 2 July 1996, R & M entered into a sale and purchase agreement with the appellant to sell the said lease subject to the terms and conditions contained therein. The appellant however did not wish to proceed with the said purchase on the ground that R & M did not have the power to sell the said lease by private agreement in view of *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In liquidation) v. Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805.

On 10 September 1997, the first respondent filed an originating summons in the Kuala Lumpur High Court for a declaration that R & M was duly empowered by the said debenture to sell the said lease.

On 20 September 1997, the learned judge granted the declaration and ruled as follows (p. 63 Rekod Rayuan):

> I find as a fact that the Administrative Receivers/Managers are the authorised agents of the company under the debenture and as such are authorised to enter into any sale and purchase agreement on the assets of the company; subject however to the obtaining of the prior consent of the debenture holders and which consent was freely given by the second defendants to the Court. Therefore, the need on the part of the Receivers/Managers in any way invoking the Orders of the High Court, 1980 *(sic)* only become applicable where such sale is proceeded by the chargee under its foreclosure proceedings and not where the chargor so proceeds with the sale by consenting parties.
>
> I hold, that under these circumstances the administrative Receivers/Managers as agents of the company are absolutely free and empowered to dispose off the assets of the company; and their act binds the company.

The appellant appealed against the above decision. The Court of Appeal dismissed the appeal and ordered that each party to bear its own costs. In the main, the Court of Appeal was in total agreement with the submission of the learned counsel for the first respondent that the ratio in *Kimlin* did not apply to the case under appeal because of several distinguishing features. In its judgment (at pp. 324-5 Rekod Rayuan) the court stated:

(a) In the *Kimlin* case, the chargor company was wound up and consequently, the receivers and managers ceased to be agents of the chargor company;

(b) in the present case, the chargor was not wound up;

(c) the debenture under consideration here empowers a receiver and manager appointed under the debenture to act as agents of the first respondent, in the exercise of the powers accorded to the receiver and manager under the debenture;

(d) the debenture under consideration here contains a validly constituted power of attorney clause, irrevocably appointing the receiver and manager the lawful attorney of the first respondent;

(e) the provisions of the Code deal with the powers of the chargee to sell land charged under the Code so that any receiver and manager appointed by the creditor of the charged property must conform to the Code;

(f) at any time before an order for sale is made, a chargor can sell land charged under the provisions of the Code by way of private treaty where the proceeds of sale are sufficient to settle the outstanding debt or where the chargee consents;

(g) where an order for sale has been obtained, the charged land must be sold by public auction, subject to the right of the chargor to pay off its indebtedness to the chargee in full to the Registrar of the Court before the sale of the charged land, under the provisions of section 266 of the Code;

(h) the first respondent in the present case, as the registered proprietor of the lease, is entitled to deal with the lease in such manner as a registered proprietor would, subject to the rights of the encumbrancer, namely, the second respondent.

We hasten to add that in the *Kimlin* case, it was the borrower company that was complaining about the sale apart from being wound up whereas here it is the borrower company that is asking for the sale order and it has never been wound up.

Appeal Before Us

The thrust of the argument for the appellant was that the question should be answered in the negative following *Kimlin*.

Encik Ng Chew Hor submitted that in the present case the R & M in entering into the said agreement with the appellant had acted at the instance and under the direction of the second respondent and therefore the said sale was an attempt to avoid the requirements of complying with the provisions of the National Land

Code for a judicial sale of the said lease. Secondly, he contended the right and powers of the R & M to sell the said lease when there exists a registered charge under the National Land Code is void. Thirdly, the power of attorney contained in the debenture contravened the National Land Code and is void under s. 24 of the Contracts Act 1950.

Encik Naban, for the first respondent, submitted that *Kimlin* could not apply because the *ratio decidendi* of the case was based on a completely different set of facts. Counsel highlighted the following distinguishing features in *Kimlin*:

1. In *Kimlin*, the chargor/company was wound up and consequently, the R & M ceased to be agents of the chargor/company but instead became agents of the chargee.

2. The chargor/company (the first respondent) in the instant case was not wound up and consequently, unlike *Kimlin*, the R & M remained as agent of the first respondent.

3. The Debenture in *Kimlin* contained no express provision appointing the R & M as attorneys of the chargor/company.

4. In the instant case, the Debenture empowers the R & M to act as the lawful attorney and agent of the first respondent and to exercise the powers accorded under the debenture.

The facts in *Kimlin*, taken from the headnote (p. 806) were these. The appellant, the borrower company was the registered proprietor of certain lands ('the land'). The appellant executed two legal charges ('the charges') under the National Land Code 1965 over the lands in favour of Bank Bumiputra (M) Bhd ('the first respondent') to secure banking facilities granted to the appellant. The charges were duly registered under s. 108 of the Companies Act 1965 ('the Act'). Subsequently, the appellant executed a deed of debenture in favour of the first respondent to secure various banking facilities ('the debenture') whereby the appellant created both a fixed charge and a floating charge. The debenture was duly registered pursuant to s. 108 of the Act. The debenture provided, *inter alia*, for the bank to appoint receivers and managers and for such receivers and managers to have certain powers. Subsequently, events occurred upon which the powers to appoint receivers and managers under the debenture became exercisable. On 13 August 1987, pursuant to such powers, the bank duly appointed the second, third and fourth respondents as receivers and managers of the appellant ('receivers and managers').

Since there was no express provision in the debenture appointing them attorneys of the appellant and being desirous of selling the lands without resorting to proceedings under the NLC to obtain a judicial sale, the receivers and managers applied to the High Court by way of originating summons for leave to sell the lands. On 27 February 1989, the appellant went into liquidation and the application by the receivers and managers was opposed by the liquidator.

The learned judge held that:

(1) the receivers and managers were entitled to sell the lands which were subject to the charges, without taking proceedings under the NLC to obtain a judicial sale;

(2) the fact that a company has been put into liquidation does not affect the securities held by the receivers and managers; at least not until the secured creditors had been fully paid off.

The secured creditors could therefore dispose of the securities despite the liquidation. The trial judge further said that receivers and managers were entitled to what the debenture provided for. The liquidator, being dissatisfied with the judgment of the court below appealed.

Counsel for the first respondent relied on s. 206(3) of the NLC which provides that the provisions of the NLC requiring a dealing to be effected in the statutorily prescribed manner shall not affect the contractual operation of any transaction relating to alienated land or any interest therein.

The question for decision was whether the learned judge was right in holding that the receivers and managers were entitled to sell the lease which was subject to the charges without taking proceedings under NLC to obtain a judicial sale.

Based on the facts, the Supreme Court, after considering the "nature and characteristics of a charge under NLC, the rights and powers incidental to such a security" (p. 817) and following Dass on *The Torrens System in Malaya* at p. 429 para. 2 and 3 held, *inter alia* as follows:

(1) Under common law mortgage, the rights and powers of the mortgagee are those which are incidental to the legal or equitable estate vested in him in his role as mortgagee; whereas in the statutory charge under the NLC, the rights and powers of the chargee are not derived from such estate since none is vested in him and so his rights and powers must flow from the relevant provisions of the NLC with the charge taking effect as a security only, enforceable by proceedings in court to obtain a judicial sale.

(2) The provisions of the NLC as to the rights of chargers ate designed for their protection and could not be waived nor could the chargor contract himself out of the NLC. It follows, therefore, that no power of sale could be conferred by a chargor under the NLC on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the procedure laid down in the NLC. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default, by a debenture or power of attorney and the necessity for obtaining a judicial sale, would be invalid and ineffective to entitle a purchaser to be regarded as owner.

(3) The provisions of the NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights – unless expressly provided for in the Code – would be void as being contrary to public policy.

Therefore, the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the NLC to obtain a judicial sale.

Conclusion

From the facts in Kimlin, it is abundantly clear to us that the debenture dated 29 June 1985 created by the appellant in favour of the first respondent did not contain an express provision appointing the receivers and managers as attorney of the appellant. Secondly, on 27 February 1989, the appellant went into liquidation. Hence, it was the liquidator who opposed the application for sale under the debenture in the High Court, and later caused an appeal be brought before the Supreme Court.

Thus, on the given facts, we have no reason to disagree with the *ratio decidendi* of the Supreme Court in *Kimlin* except to make one observation that the Supreme Court did not consider the position of the receiver and manager as the agent of the appellant company which went into liquidation.

We agree with *Kimlin* that Part XVI of the NLC deals with the rights and remedies of parties under a statutory charge over land. Section 256(2) NLC provides:

> Any application for an order for sale under this Chapter by a **chargee** of any such land or lease shall be made to the Court in accordance ... . (emphasis added)

Clearly, the section provides a prescribed method of sale to be undertaken by a chargee not a chargor. In the instant appeal, however, the sale was undertaken by the R & M on behalf of the first respondent, the chargor of the said lease. In our view, the provisions of NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R & M was acting as agent of the chargor.

Encik Ng Chew Hor, for the appellant also submitted that the power of attorney given to R & M under the debenture was an attempt to avoid the effect of and was but a means to contract out of the provisions of NLC and was therefore void. Looking at the debenture in the Appeal Record, we are satisfied the said power of attorney complied with ss. 3(2) and 4(1) of the Powers of Attorney Act 1949. In our view, the R & M could act and exercise the power under the debenture. We therefore find no merit in counsel's contention that the power of attorney was a means to contract out of the provision of NLC.

Finally, we agree entirely with the Court of Appeal and Encik Naban's submission that there are distinguishing features in *Kimlin* and in the instant appeal.

For reasons stated above, it is our conclusion that the *ratio decidendi* of *Kimlin* cannot apply to the instant appeal.

We would therefore answer the question in the positive. However, this is not the end of the matter. In our view, the question which we have just answered does not involve a question of general principle decided for the first time or a question of importance upon which further argument and its decision would be to public advantage. What we have just answered was simply whether the facts in the instant appeal are similar to the facts in *Kimlin* and not whether they raise a new question of law decided for the first time. On hindsight, leave to appeal should have not been granted.

Finally, in view of s. 78(1) Courts of Judicature Act 1964, this reserved judgment is given in the absence of the presiding judge, who passed away on 24 December 2001. My learned brother, Steve Shim Lip Kiong, CJSS has read this judgment in draft with which he agreed.

This appeal is therefore dismissed with costs and the deposit be paid out to the respondents to account of taxed costs.